IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Case No.: 3:17-cv-00133-FDW-DCK

CLAUDETTE FRANZ and RICHARD M. KAUFMAN, Plaintiffs, v. CAPITAL ONE BANK (USA), NATIONAL ASSOCIATION, CAPITAL ONE SERVICES, LLC, ARS NATIONAL SERVICES, INC., MIDLAND FUNDING LLC, MIDLAND CREDIT MANAGEMENT, INC. and RECEIVABLES PERFORMANCE MANAGEMENT, LLC, Defendants.	)	**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR REMAND**

COME NOW Plaintiffs Claudette Franz and Richard M. Kaufman ("Plaintiffs"), by and through their undersigned counsel, hereby submitting this Memorandum in Support of Plaintiffs' Motion for Remand pursuant to 28 U.S.C. § 1146, 28 U.S.C. § 1447 and Local Rules 7.1 and 7.2.

1. BACKGROUND & SUMMARY OF ARGUMENT

This is a consumer protection lawsuit arising as a result of the systemic failure of one or more of the above-named Defendants ("Defendants") to account for a full and final payment made on a consumer credit account of Plaintiff Claudette Franz. Specifically, on January 13, 2015, Plaintiffs paid the balance of a consumer credit debt alleged to be owed by Defendants Capital One Bank (USA), N.A., and/or Capital One Services, LLC (the "Capital One Defendants"). Capital One Defendants accepted those funds, but, instead of applying the funds to the proper account, sold or otherwise transferred the Alleged Debt to third-parties for collection.

Plaintiffs move to remand this action to the Superior Court of Union County, North Carolina on the grounds that all Defendants did not consent to removal within the thirty-day period proscribed by 28 U.S.C. § 1446(b), and, as a result, there is no federal jurisdiction over this matter.

2. PROCEDURAL BACKGROUND

On November 10, 2016, this civil action was initiated in the Superior Court of Union County, North Carolina against Defendants and provided file number 16-CVS-2968 (the "Civil Action"). On January 23, 2017, Plaintiffs filed an Amended Complaint ("Amended Complaint") and timely obtained Alias and Pluries Summonses ("A&P Summons") as to all Defendants. A copy of an appropriate A&P Summons and the Amended Complaint were served upon the parties on the following dates:

- Defendant Capital One Bank (USA), National Association ("Defendant Capital One Bank") was served on February 16, 2017;
- Defendant Capital One Services, LLC ("Defendant Capital One Services") was served on February 15, 2017;
- Defendant ARS National Services, LLC ("Defendant ARS") was served on February 15, 2017;
- Defendant Midland Funding LLC ("Defendant Midland Funding") was served on February 15, 2017;
- Defendant Midland Credit Management, Inc. ("Defendant Midland Credit") was served on February 15, 2017; and
- Defendant Receivables Performance Management, LLC ("Defendant RPM") was served on February 15, 2017.

See DE 20.

On March 16, 2017, Defendants Midland Funding, LLC and Midland Credit Management, Inc. (collectively the "Midland Defendants") gave Notice of Removal and subsequently filed an Amended Notice of Removal in this Court pursuant to 28 U.S.C. § 1441(a). DE 2. None of the other Defendants have expressed consent for Midland Defendants' removal.

3. ARGUMENT

a. Removal Jurisdiction is Strictly Construed.

Federal courts are courts of limited jurisdiction. It is presumed "'that a cause lies outside of this limited jurisdiction . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction.'" *Barbour v. Intern. Union*, 640 F.3d 599, 605 (4th Cir. 2011) (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). The federal courts have consistently held that they are "obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated." *Maryland Stadium Authority v. Ellerbe Becket, Inc.*, 407 F.3d 255, 260 (4th Cir. 2005) (citing and quoting *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994)). Any doubts about the propriety of removal should be resolved in favor of remanding the case to state court. *Id.*; *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004).

"When one party makes a motion to remand a case to the state court, '[t]he burden is on the party seeking to preserve the removal, not the party moving for remand, to show that the requirements for removal have been met.'" *Freeman v. Bechtel*, 936 F.Supp. 320, 323 (M.D.N.C. 1996) (quoting 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3739, at 574 (1985 & Supp.1995)). Accordingly, the burden is on Midland Defendants to demonstrate that the removal requirements of 28 U.S.C. § 1446 have been satisfied.

b. "Rule of Unanimity."

"The removal jurisdiction of the federal courts is derived entirely from the statutory authorization of Congress. [A federal court, therefore] look[s] to federal law to determine whether the elements of removal jurisdiction have been established under the statutes . . ." *Link Telecommunications, Inc. v. Sapperstein, et al.*, 119 F. Supp. 2d 536, 540 (D. Md. 2000). The statutory procedures for removal are set forth in 28 U.S.C. § 1446. The Supreme Court has construed § 1446 to include a "unanimity requirement," such that all defendants must consent to removal. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) (citing *Chicago, R.I. & P.R. Co. v. Martin*, 178 U.S. 245, 248 (1900), for the proposition that "removal requires the consent of all defendants"); *Wis. Dep't of Corrections v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) ("Removal requires the consent of all of the defendants").

The Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA") codified the unanimity requirement and the so-called "Last-Served Defendant Rule," which provides that in cases involving multiple defendants served at different times, the last-served defendant has until 30 days after effectuation of service to file a Notice of Removal.

The unanimity requirement is now codified expressly in § 1466. The pertinent subparagraph provides:

> When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

28 U.S.C. § 1446(b)(2)(A).

Subparagraph (b)(2)(C) of the same section was also an addition made by the JVCA, providing in pertinent part:

> If Defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may

> consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

28 U.S.C. § 1446(b)(2)(A).

In order to remove a case from state court jurisdiction pursuant to 28 U.S.C. § 1446, each defendant must "officially and unambiguously consent to removal" within thirty days of service of the complaint. *Brodar v. McKinney*, 378 F.Supp.2d 634, 637 (M.D.N.C. 2005) (quoting *Parker v. Johnny Tart Enters. Inc.*, 104 F.Supp.2d 581, 583-584 (M.D.N.C. 1999)). "The consent of all defendants to removal is not a mere technicality, but an important part of the burden carried by the party seeking removal jurisdiction." *Egle Nursing Home, Inc. v. Erie Ins. Group*, 981 F.Supp. 932, 935 (D.Md. 1997).

c. Timing of Consent.

When earlier-served defendants have filed a Notice of Removal and a non-signing defendant is served after the filing of such Notice of Removal, the after-Notice defendant is allowed 30 days from service of process to file an independent Notice of Removal or consent to the previous Notice. *McKinney v. Board of Trs*., 955 F.2d 924, 928 (4th Cir. 1992); *Barbour v. Int'l Union*, 640 F.3d 599, 610 (4th Cir. 2011) (en banc).

Putting the plain language of the statute together with the Fourth Circuit analysis in *McKinney* and *Barbour*, any defendant properly joined and served prior to the Notice of Removal must join and consent to the Notice of Removal by the later date of: (a) when the Notice of Removal is filed; or (b) 30 days after the defendant was served with the Summons and Complaint. This is precisely the reasoning of the Honorable Ellen Hollander in her decision in *Moore v. Svehlak*, 12-cv-2727, at pgs. 12-17 (Dist. Md., July 11, 2013). In *Moore*, Judge Hollander provided an extensive overview of the Rule of Unanimity and the timing requirements under 28 U.S.C. §

1446(b)(2)(A). She expressly rejected the defendants' argument that consent was only necessary within a "reasonable time," and held:

> In light of the current statute's affirmative statement that "[e]ach defendant shall have 30 days" in which to make a removal decision; in light of *Barbour* and *McKinney*; and given the statute's statement that an earlier-served defendant may "consent" to a notice of removal, it is reasonable to interpret the statute as plaintiffs do: "[A]ny defendant properly joined and served prior to the Notice of Removal would have to join in or consent to the Notice of Removal at [the] later of (1) when it is filed; or (2) 30 days after the defendant was served with the Summons and Complaint."

Id. at 15.

This exact ruling of Judge Hollander has been confirmed at least two additional occasions by district courts in the Fourth Circuit, including the Eastern District of North Carolina. *See e.g., Gates at Williams-Brice, et al. v. Quality Built, LLC, et al.*, 3:16-cv-02022, pgs. 12-13 (Dist. S.C., Sept. 7, 2016) ("[T]his court concludes that the deadline for indicating consent of co-defendants is the later of when the notice of removal is due or within thirty days of when the consenting defendant was first served."); *Howerton v. Corbin Pacific, Inc. et al.*, 5:13-cv-644-BR (E.D.N.C., Nov. 13, 2013). Copies of the *Svehlak*, *Gates*, and *Howerton* Orders are attached hereto respectively as **Exhibits A, B**, and **C**.

d. The Purported Removal in this Matter Clearly Lacks Unanimity.

Each defendant must "officially and unambiguously consent to removal" within thirty days of service of the complaint. *Brodar v. McKinney*, 378 F.Supp.2d 634, 637 (M.D.N.C. 2005) (quoting *Parker v. Johnny Tart Enters. Inc.*, 104 F.Supp.2d 581, 583-584 (M.D.N.C. 1999)). The Fourth Circuit has, however, relaxed the standard by holding that "notice of removal signed and filed by an attorney for one defendant representing **unambiguously that the other defendants**

consent to the removal satisfies the requirement of unanimous consent for purposes of removal." *Mayo v. Board of Educ. of Prince George's County*, 713 F. 3d 735, 742 (2013) (emphasis added).

In the present matter, there has been nothing filed by the Midland Defendants that unambiguously represented that all other Defendants consented to the removal. DE 2, ¶ 14.[1] Further, none of the remaining Defendants filed anything with the Court prior to the expiration of their thirty-day period indicating their consent to removal. Therefore, this case must be remanded to the Superior Court of Union County.

e. The Unanimity Requirement Cannot be "Cured."

The Midland Defendants appear to argue in their Notice of Removal that they do not need to satisfy the consent requirement of § 1446(b) because the other defendants were not "properly joined and served" at the time of their filing. DE 2, ¶ 14. In addition to being legally insufficient, this is simply inaccurate as all defendants were served contemporaneously with the Midland Defendants. *Supra* at p. 2. Further, in discussions regarding this Motion to Remand, Counsel for the Midland Defendants indicated that it can "cure" the unanimity defect to subsequently reflect the consent of all Defendants. However, "[t]he consent of all defendants to removal is not a mere technicality." *Egle Nursing Home, Inc. v. Erie Ins. Group*, 981 F.Supp. 932, 935 (Dist. Md., 1997). The failure of the remaining Defendants to officially consent within the required thirty-day period is a "defective jurisdictional fact," which cannot be corrected by a motion to amend the Notice of Removal. *Id.* at 935.

Respectfully submitted, this the 31st day of March, 2017.

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[1] In their Notice of Removal, the Midland Defendants stated only that no other defendants were properly served at the time of their Notice of Removal. This does not satisfy the requirements of 28 U.S.C. § 1446.

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I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which sent notification of the filing to the following:

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This the 31st day of March, 2017.

/s/ *Karl S. Gwaltney*
KARL S. GWALTNEY